Supreme Court, U.S.
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No. 94-1887

In The

Supreme Court of the United States

October Term, 1994

BRUCE WILLINGHAM AND TOM GRAY,

Petitioners,

v.

THE SAC AND FOX NATION,

Respondent.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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STATEMENT

The complaint filed by the Sac and Fox Nation in the Federal Court below sought to enjoin a State court action, which, in turn, was attempting to decide the right of former Sac and Fox officials, namely Commissioners of the Sac and Fox Industrial Development Commission, to indemnification under the laws of the Sac and Fox Nation. These Commissioners held office under the Nation's laws, and were responsible for carrying out their duties under Sac and Fox laws as officers of an independent agency of the Sac and Fox Nation.

Several former members of the Board of Commissioners of the Sac and Fox Industrial Development Commission were sued in state court by former employees of the Commission. Petitioners filed a third party state suit directly against the Sac and Fox Nation requesting that the Nation be found liable to them if the Petitioners were found liable to the state court Plaintiffs in the primary suit in the state court. Petitioners wholly failed to allege any basis for state court jurisdiction over the Sac and Fox Nation. The Sac and Fox Nation has never waived its immunity from this third party suit. Without such a waiver of immunity, Petitioners' suit was properly enjoined from proceeding.

SUMMARY OF ARGUMENT

This Petition for a Writ of Certiorari should be denied. A Petition for a Writ of Certiorari will only be granted when there are special and important reasons therefor. Supreme Court Rule 10. Of concern here are

two of the possible reasons for review: first, whether the court of appeals decision is in conflict with another court of appeals, or has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. Second, has the court of appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or decided a federal question in a way that conflicts with applicable decisions of this Court. None of the above factors are present in this case.

This Court and the lower circuits have squarely and repeatedly held that sovereign immunity is one of the fundamental aspects of sovereignty still retained by the tribes. While Petitioners review many Supreme Court cases that recognize the limitations upon the generic concept of Indian Tribes sovereign powers, *Petitioners' brief* pp. 12-14, they do not present a single decision that limits the tribes specific power of sovereign immunity from suit absent express tribal consent, or express Congressional authorization. The Tenth Circuit correctly recognized this doctrine.

Petitioners also argue, without explicitly stating, that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (hereinafter *Santa Clara*) should be reversed. Respondent believes that the Supreme Court should not abandon the doctrine of sovereign immunity as found in *Santa Clara*, its predecessors or progeny. Respondent also believes that barring a complete reversal of Supreme Court jurisprudence, this case does not present the proper facts to carve out an exception to sovereign immunity where external relations of an Indian tribe are involved.

Finally, the Supreme Court has previously held in matters involving Indian tribes and tribal matters, that the tribal court should be given first opportunity to determine tribal jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987). Respondent believes that the lower court correctly applied the above Supreme Court's Indian law jurisprudence to the case below.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. THE SUPREME COURT HAS CLEARLY UPHELD THE SOVEREIGN IMMUNITY OF INDIAN TRIBES

Petitioners begin their argument by stating that "this is a case in which the United States Court of Appeals for the Tenth Circuit abandoned what Petitioners assert is a clear and historical legal precedent in favor of an unquestioning acceptance of the 'so called Santa Clara declarations.' " *Petitioners' brief* at p.7. Petitioners miss the very point of their own statement, that this Court has repeatedly confirmed the sovereign immunity of Indian tribes, bands, and nations, and this is the settled law. While Petitioners wish otherwise, this is not an unsettled area of the law, nor is there any dispute between the lower courts. This Court, speaking through Justice Marshall in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 (1978), said that:

> Indian Tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia,* (6 Pet.) 515, 559 (1832); *see*

> *United States v. Mazurie*, 419 U.S. 544, 557 (1975); F. Cohen, *Handbook Of Federal Indian Law*, 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382, (1886). *See, United States v. Wheeler*, 435 U.S. 313 (1978) . . . Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 172-173 (1977).

The Tenth Circuit clearly adhered to the Supreme Court's articulation of sovereign immunity as described in *Santa Clara*. In fact, failure of the circuit court to follow the holding of *Santa Clara* could have been reason for this Court to grant a Writ and reverse because Indian tribes, including the Sac and Fox Nation, are immune from suit absent express authorization from Congress or the tribal government. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), *Santa Clara, supra.*

Sovereign immunity clearly remains the law as applied to federally recognized Indian tribes. The Tenth Circuit's decision falls squarely in line with previous decisions of the Tenth Circuit and other federal circuits including the Second, Eighth, and Ninth circuits regarding sovereign immunity. More importantly the Tenth Circuit's decision also follows the decisions of this Court

regarding sovereign immunity in general, and more particularly the doctrine as it applies to Indian Tribes. Thus, the Tenth Circuit ruled properly.

The Petitioners are simply wrong when they try to deny that Indian tribes possess common law immunity from suit traditionally enjoyed by sovereign powers. See, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, ___ U.S. ___, 111 S.Ct. 905 (1991); *Santa Clara*, 436 U.S. at 58 (1978); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-173 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919) The courts that have addressed the topic of sovereign immunity have uniformly recognized that doctrine and this principle has been uniformly followed. To alter that doctrine would be to abandon reams of court decisions not only in this Court[1], but also in the Tenth Circuit[2] and in the other circuits.[3]

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[1] *Lehman v. Nakshian*, 453 U.S. 156 (1981); *United States v. King*, 395 U.S. 1 (1969); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984); *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[2] *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

[3] *Whitefoot v. United States*, 293 F.2d 658 (Ct.Cl. 1961), cert. denied, 369 U.S. 818 (1962); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957), cert. denied, 355 U.S. 893 (1957); *Maryland Casualty Company v. National Bank* , 361 F.2d 517 (5th Cir. 1966); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Adams v. Murphy*,

No express waiver of sovereign immunity was made by the Sac and Fox Nation or by Congress. Since there was no express waiver of immunity from suit, it is clear that the Sac and Fox Nation was not subject to suit in state court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 172- 173 (1977)[4] Both the Tenth Circuit and the other federal circuits have also uniformly recognized tribal sovereign immunity. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957), *cert denied* 335 U.S. 893 (1957); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979).

Contrary to Petitioners' attempted rewriting of history, sovereign immunity is not merely a theory, it is the law. Even the dissents cited by the Petitioner, *Petitioners' brief* at p. 20, such as Justice Stevens, conceded that "The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 912 (1991).

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165 F. 304 (8th Cir. 1908); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Greene v. Wilson*, 331 F.2d 769 (9th Cir. 1964); *People of the State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979).

[4] *See also, United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919); *Lynch v. United States*, 292 U.S. 571 (1934). *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).

II. THE SUPREME COURT SHOULD NOT ABANDON THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY

Petitioner essentially argues for reversal of fifty years of Supreme Court precedent, beginning with *U.S. v. United States Fidelity & Guaranty, supra,* and continuing up to *Oklahoma Tax Commission v. Potawatomi Indian Tribe, supra.* Petitioners recognize that the Tribes have immunity from suit. *Petitioners' brief,* footnote 7. However, the Petitioners then attempt to convince this Court to disregard its holdings because the Petitioners do not believe the theory of sovereign immunity was based upon proper historical precedent. The Supreme Court should decline such an invitation. Once this Supreme Court has spoken on a subject, the Court should not lightly reverse its course, especially one that is so firmly established in its jurisprudence.

In Petitioners' perception *Santa Clara* was in error and unsupported by precedent or law. *See Petitioners' brief* at footnote 9, p. 8-9. Respondent believes that *Santa Clara* was not an aberration. *Santa Clara* was not based upon shoddy historical analysis by the Court. To the contrary, the Court has repeatedly affirmed the substance of *Santa Clara,* and its doctrines, as shown by the Court's recent reference to the doctrine:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in a number of cases. *Turner v. United States,* 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *Santa Clara Pueblo v. Martinez, supra,* 436 U.S., at 58, 98 S.Ct., at 1677. Congress has always been at liberty to dispense

> with such tribal immunity or to limit it . . . . Instead, Congress has consistently reiterated its approval of the immunity doctrine . . . . Under these circumstances, we are not disposed to modify the long-established principal of tribal sovereign immunity.

Oklahoma Tax Commission v. Potowatomi Indian Tribe, ___ U.S. ___, 111 S.Ct. 905, 910 (1991). This immunity from suit is subject only to the plenary power of Congress. *Santa Clara*, 436 U.S. 58 (1978); *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 173, (1977). As a plenary power, the solution to potential problems with sovereign immunity is to seek redress in Congress, not further review by this Court. *Potawatomi Indian Tribe*, 111 S. Ct., at 912.

Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

III. THIS CASE IS NOT APPROPRIATE FOR RESTRICTING THE SCOPE OF SOVEREIGN IMMUNITY.

Assuming arguendo, that the Petitioner is not seeking a complete abandonment of the sovereign immunity doctrine, the case below is not the proper one in which to carve out an exception for tribal activities involving non-members going beyond tribal jurisdiction. Petitioners have tried to classify the underlying case as one involving the rights of off-reservation non-Indians against an Indian Tribe. However, Petitioners' assertions are belied

by the fact that the Petitioners in this case are two individuals who voluntarily assumed positions on the Sac and Fox Industrial Development Commission (SFIDC), *Petitioners' brief* at 3. The SFIDC was created by the Sac and Fox Nation under Sac and Fox Law. Therefore, this case involves a dispute between a federally recognized Indian tribe and people who were acting in the capacity of officials of a tribally created business. The former commissioners are now asking that they be allowed to sue the Sac and Fox Nation for indemnification for whatever liability they, as commissioners of the tribally created board, may have accrued.

Whatever the facts relating to the demise of SFIDC, this case does not squarely present an opportunity to rule upon sovereign immunity as it relates to external actions of an Indian nation. A right to indemnification would necessarily involve the respective right of the Petitioners and under the laws, customs and traditions of the Sac and Fox Nation. As such, this case should not lead to the rethinking of the sovereign immunity doctrine as laid out by this Court and followed by the various circuit courts of appeals.

However, given the above, even as to external actions there is no conflict among the circuits. Federal courts have repeatedly held that Indian Nations cannot be sued for monetary damages in the face of sovereign immunity which has neither been explicitly waived by the Tribe nor abrogated by Congress. In *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993) injunctive relief was denied for plainly external actions of the Tribe. The plaintiff there sought injunctive relief against the Narragansett Tribe for trespass upon his property, property in which

the Tribe had affirmatively relinquished all claim and title. The Court for the First Circuit spent little time in disposing of that case, holding:

> The Tribe's surrender of its right to sue for non-settlement lands neither says nor implies anything about surrender of its sovereign immunity from suit relating to its territorial or *extraterritorial* actions. Absent explicit congressional authorization to the contrary, the district court had no choice but to dismiss the present action for lack of jurisdiction. (emphasis added)

Maynard v. Narragansett Indian Tribe, 984 F.2d at 16. Other circuits are in accord, *Black Hills Institute v. Dept. of Justice*, 967 F.2d 1237, fn.5 (8th Cir. 1992); *In Re Greene v. Mt. Adams Furniture*, 980 F.2d 590 (9th Cir. 1992); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992).

The decision below, even at its worst possible interpretation, presents no conflict among the circuits. While no Supreme Court case has directly addressed this issue, this Court has held that a State cannot require a Tribe to waive its sovereign immunity in order to take official tribal action outside the Indian Country of the Tribe, *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 106 S.Ct. 2305 (1986).

Petitioners cited no federal jurisdictional statute conferring state court authority over the Sac and Fox Nation or waiving the Sac and Fox Nation's immunity from suit because there are none. Therefore, there was no state court subject matter jurisdiction in the underlying action pursuant to federal law. In similar circumstances, the Tenth Circuit held the Muscogee (Creek) Nation immune

from suit. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). Since in this case the Nation never granted any waiver as to the Nation itself, the Sac and Fox Nation is immune from suit by the Petitioners. *See also, Sac and Fox Nation v. Oklahoma Tax Commission*, 967 F.2d 1425 (10th Cir. 1992), vacated and remanded on other grounds, ___ U.S. ___, 113 S.Ct. 1985 (1993), where the Tenth Circuit held that the Sac and Fox Nation was immune from any attempt by the Oklahoma Tax Commission to recover taxes which would be due on non-tribal member income and motor vehicles.

IV. THE DOCTRINES OF EXHAUSTION AND COMITY WERE PROPERLY FOLLOWED IN THE CASE BELOW.

This case also does not present a reason to rethink the Supreme Court law enunciated in *Iowa Mutual* and *National Farmers Union* which support the holding below that the Petitioners should have proceeded, if at all, in the tribal court. The Tenth Circuit's decision below is squarely in line with this Court's precedent, and other circuits' decisions, requiring parties to first proceed in tribal court where issues involve the Tribe and tribal law.

In this case, the Respondent was named in the state court action when several members of the Board of Commissioners of the Sac and Fox Industrial Development Commission sought indemnification from the Sac and Fox Nation. That proceeding, as noted in Part III above, was inextricably intertwined with the internal laws and regulations of the Sac and Fox Nation.

In *Iowa Mutual Ins. Co. v. LaPlante, supra,* the petitioner attempted to bring suit in federal court based on diversity jurisdiction. The *Iowa Mutual* Court, in refusing to allow the suit to proceed in federal court even where federal court jurisdiction was clearly present pursuant to the diversity statute, 28 U.S.C. § 1332, stated:

> Although petitioner alleges that federal jurisdiction in this case is based on diversity . . . rather than the existence of a federal question, the exhaustion rule . . . applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the Tribal Court a "full opportunity to determine its own jurisdiction" . . . proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors" . . . At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.

Iowa Mutual at 480 U.S. 16-17; *See, also, National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845 (1985). The *Iowa Mutual* Court went on to state that Tribal authority over activities on reservation lands is an important part of tribal sovereignty.

The state court matter involved a tribal dispute. The Third Party Plaintiffs' suit involved their actions as members of the Board of Commissioners of the Sac and Fox Industrial Development Commission which is principally located on the Sac and Fox Reservation. The tribal courts

must be given the opportunity to deal with such a controversy. State Courts, no less than the Federal Courts, must stay their hand, even if they otherwise have jurisdiction, in favor of tribal resolution of matters involving tribal law and relations. *Williams v. Lee*, 358 U.S. 217 (1959).

Respondent does not believe that the Court should revisit the issue of sovereign immunity. The lower court properly found there was no valid and clear waiver of the Respondents' immunity, and Petitioner appears to concede that point. *Petitioners' brief* at p.5. Finally, the grant of a Writ of Certiorari is inappropriate as the case involves internal laws of an Indian Tribe and people appointed to a tribally created industrial board.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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